Supreme Court, U.S.
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No. 95-1072

In the Supreme Court of the United States

OCTOBER TERM, 1995

COMBUSTION ENGINEERING, INC., *Petitioner*

v.

CHERYL MALOOF JOHANSEN, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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So far as we are aware, this Court has held every recent petition presenting a preserved claim of excessiveness of punitive damages pending its consideration and disposition of *BMW*. The overheated rhetoric employed by respondents so effectively before the jury and repeated here in their effort to persuade the Court to deny review, far from demonstrating that there is no reasonable prospect that the outcome could be affected by the decision in *BMW*, serves primarily to illustrate the need for careful judicial review of large punitive exactions.

Respondents paint a picture of a heartless, greedy mining company that wreaked "environmental havoc" and "devastation" on the neighboring properties, killing the streams and everything that lived in them. Opp. 3-5. One notable problem with their picture is that they have used old paint. As the jury's $47,000 compensatory verdict reflects, respondents suffered minimal harm as a result of any conduct that the jury was entitled to punish. Rather, virtually all of the "devastation" upon which respondents focus took place in the 1960s and 1970s, well outside of the limitations period. So too did much of the related conduct that they claim was so egregious.[1]

The temporal blurring in which respondents engage is no mere technicality. In the 1960s and 1970s, CE was engaged in an activity — kyanite mining — that, however valuable to society at large, could be said to have actively created a nuisance affecting neighboring property owners. Since mining ceased, however, CE has not committed any kind of active nuisance. Rather, its tort (accepting for present purposes that it was a tort) was a purely passive one — failure to act more quickly and aggressively to pre-

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[1] Although respondents suggest (Opp. 4 n.4) that the evidence on which they so heavily rely was admissible for Rule 404(b) purposes, they, like the respondent in *BMW*, seek to use that evidence for far more here. For example, they respond to our contention that the punitive damages are disproportionate to the harm they were found to have suffered by emphasizing the damage done to their streams "[s]hortly after mining operations began." Opp. 4; see also Opp. 5, 14 (referring to uses of the streams — such as drinking, swimming, and fishing — that became unavailable during the 1960s). Similarly, in attempting to distinguish this case from *BMW*, respondents assert that CE departed from industry practice by failing to reclaim the mine site *while mining operations were ongoing*. Opp. 24; see also Opp. 3, 9 n.7, 13.

vent acidic water from escaping into the streams. Such a tort is different in kind from (and accordingly should not be lumped together with) the maintenance of an ongoing nuisance.

Similarly, although the evidence might support a finding that the mining operations impaired the streams, many of the respondents readily conceded that the condition of the streams has *improved* since mining ceased and reclamation began. Tr. 435, 485-486, 504-505, 522-523, 562-563, 652; see also 1021-1022. This concession makes it all the more important that the focus be on the $47,000 aggregate harm found by the jury, rather than respondents' rhetoric about "environmental devastation." When the focus is placed where it properly belongs, it could not be clearer that the $15 million exaction in this case bears no reasonable relationship to either the punishable conduct or the harm suffered as a result of that conduct.

Respondents' other efforts to salvage their massive windfall are based upon distortions of the record (for example, the repeated, yet utterly unsupported, assertion that EPD was dissatisfied with the pace of the reclamation effort) and sophistic wordplay (for example, the talismanic incantation that CE made a "profit" of $6 million by failing to take remedial steps set forth for the first time by respondents' expert during the second phase of the trial). As we now show, none of these tactics justifies denying the petition without awaiting the outcome of *BMW*.

REPLY STATEMENT OF FACTS

Respondents have taken unwarranted liberties with the record, making several outright misstatements, quoting exhibits and testimony out of context, and repeatedly drawing inferences that the evidence as a whole simply will not support. Although these distortions would not justify the disproportionate punishment in this case even if they were entirely accurate, we must correct at least some of them in order to reestablish some semblance of reality.

1. *Events that occurred on CE's property*. Like their efforts at temporal blurring, respondents engage in geographic blurring, repeatedly referring to events and testing that occurred on CE's property as if those events and tests actually took place on respondents' properties. For example, in stating that CE "disposed of the tailings by harnessing the water used in the milling process to

transport them down the mountainside" (Opp. 3), respondents imply that the tailings were deposited on their properties. In fact, they were deposited in tailings ponds *on CE's property*. Tr. 176, 566-567. Similarly, the photograph at the end of respondents' appendix — which evidently was included for purposes of its presumed shock value — features CE's property (which by that point had been mined for decades) almost exclusively and does not even show the properties of most of the respondents, let alone the four streams that are the subject of this litigation.

Respondents engage in the same tactic when referring to testing. See Opp. 5 n.5, 8. The substantial majority of the tests performed by the EPD and by respondents' own team of hydrologists took place on CE's property. See Tr. 90, 142-143; P. Exhs. 7, 9. Most of the tests performed on *respondents'* properties found the pH to be within acceptable levels. See Tr. 173, 201, 825-855; D. Exh. 45 (stations 4-8, 10-12, 14, 15, 17); P. Exh. 12, at 2-3 (stations L-10, L-12); P. Exh. 13, at 2-4 (stations 5, 7).[2]

2. *The small number of complaints during mining operations and CE's response to them*. Respondents assert (Opp. 6) that CE received numerous complaints during the time it operated the mine site and did no more in response to those complaints than was necessary to "pacify" the neighbors so that they would "stay home and shut up." As the trial court observed, however, the complaints to which respondents point were few and far between. Tr. 803.[3] Nor does the record support the assertion that CE's response to the complaints was minimal. That assertion is based on the opinion of one respondent about the way in which CE treated his father (not anyone else) *20 years* earlier. The remainder of the testimony about CE's responses to complaints reflects that CE did whatever was necessary to satisfy the landowners. See Tr. 515-517, 520-521, 573, 1024.

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[2] As in the petition, our page cites to exhibits are derived by counting consecutively from the cover sheet of the exhibit.

[3] Indeed, the complaints during the time that CE operated the mine were so few in number that respondents have resorted to relying on a complaint to the county health department that took place in 1986 during *Pasco's* ownership of the site.

3. *CE's "notice."* Respondents' assertion (Opp. 8, 10 n.8, 12-13 n.9) that CE repeatedly was put on notice that acidic water was escaping from its property and causing damage downstream is misleading. For example, while EPD did express concern to CE about "present and potential acid run-off" during an October 1987 meeting, the senior EPD official present at that meeting indicated that "'if the streamlets were no more than what had been described to (him), * * * (he) was not going to worry about it.'" P. Exh. 23, at 4. EPD's testing in March 1988 confirmed that the flow rate was, in fact, low. See P. Exh. 7, at 7. Later that year, EPD approved CE's reclamation plan without requiring additional steps to prevent the escape of acidic water. See Ct. Exh. 1, at 43. CE's dealings with EPD thus gave it *no* reason to believe that the escape of acidic water was a problem, much less a serious one. Nor did the tests performed by CE's consultants. To the contrary, those tests reflected that the effects of acid water runoff dissipated downstream from CE's property. See P. Exh. 12, at 2-3; P. Exh. 13, at 2-4. Similarly, although CE was on notice of the *Spires* suit as of 1988, CE's and EPD's tests on the stream involved in that case revealed pH levels that were in fact well *within* acceptable standards. P. Exh. 9, at 11, 26, 28, 35, 38, 41, 46; P. Exh. 12, at 2-3 (station L-11); P. Exh. 13, at 2-4 (stations 8-10).

4. *The pace of CE's reclamation of the mine site.* Respondents' assertion (Opp. 7) that CE "made no cleanup efforts of any kind" in the first two years after taking the property back from Pasco is flatly false. The record is unequivocal that immediately after taking back the property, CE set about dismantling the plant (Tr. 358, 375, 383-384, 937-938, 940-941, 969), which was far from a routine process. Then, because Pasco's reclamation plan was inadequate, CE hired the necessary consultants to evaluate the property and make recommendations for its reclamation. Tr. 384. At the same time, it entered into discussions with EPD with a view towards developing an acceptable supplemental plan. Tr. 941.

Respondents stray even further from reality in insinuating (Opp. 8, 11) that EPD was dissatisfied with the pace of CE's efforts. The internal CE memorandum describing the October 1987 meeting with EPD, which respondents quote only selectively (see Opp. 8), reflects that there were valid reasons why it took two years for CE to submit an amended reclamation plan. From the

time operations ceased, there was considerable interest by the University of Georgia (and others) in acquiring all or part of the property for scientific purposes. P. Exh. 23, at 2-3. One of the purposes of the October meeting was to go over the University's recommendations as to which areas should be left undisturbed by the reclamation process. *Ibid.* For example, the University's mineralogy department had indicated that it "want[ed] the mine area and the surrounding dump area left unscathed by any reclamation," while the forestry and agriculture departments were "interested in the settlement pond area as a 'severely stressed study area.'" *Id.* at 5. Plainly, no reclamation plan could be submitted and approved until those recommendations had been addressed. EPD understood that perfectly. Tellingly, respondents ignore the fact that, when EPD approved the supplemental plan in December 1988, it made a point of telling CE that it "appreciated [CE's] *prompt submittal*" of the plan. Ct. Exh. 1, at 43 (emphasis added).

Respondents' assertion (Opp. 11) that EPD brought its enforcement action because of CE's "failure for five years to make any effort to remediate the streams, and its pursuit of only trivial reclamation measures" is utterly baseless. The record reflects that EPD charged two very limited and time-specific violations of CE's discharge permit — nothing more. Tr. 984-985. There is not the slightest bit of evidence in the record that EPD believed that the violations were the product of deliberate footdragging.[4] Had EPD harbored such a belief, it is inconceivable that the parties could have agreed upon a consent order as expeditiously as they did and unlikely that the accompanying fine would have been as low as it was.[5]

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[4] As an example of what they consider to be footdragging, respondents advert to "a futuristic greenhouse experiment" involving "miracle grass," which they claim was destined to fail. They curiously overlook the fact that this experiment — which, if successful, would have constituted a major advance in mine reclamation techniques — was proposed *by the EPD*. See P. Exh. 23, at 5.

[5] Although not introduced at trial, it is a matter of public record that the fine to which CE consented was in the amount of $10,000.

ARGUMENT

A. The Excessiveness Issue

Respondents claim (Opp. 23-25) that there is no need to hold this case because it is distinguishable from *BMW* in several regards. Although there are, of course, differences between this case and *BMW* (just as there are in every other case the Court is holding for *BMW*), the central issue in the two cases is the same — whether a multimillion dollar punitive damages judgment is unconstitutionally excessive. The differences in the cases — which, we respectfully submit, show that the punishment here is unreasonable even if that in *BMW* were defensible — afford no ground for denial of the petition at this stage.

1. The relationship between the punitive damages and the harm to respondents. Respondents do not seriously contend that the $15 million punitive windfall bestowed upon them is reasonably proportionate to the $47,000 harm they suffered.[6] Instead, they advance the remarkable claim (Opp. 21-22) that the ratio of punitive damages to the plaintiffs' actual and potential harm has no role to play in the constitutional analysis. That contention cannot be squared with the plurality's analysis in *TXO*, which addressed the relationship of punitive damages to actual and potential harm at some length. 113 S. Ct. at 2721-2722.[7] Nor is it consistent with the Court's statement in *Haslip* that a ratio of 4:1 was "close to the

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[6] Respondents quibble with our statement of the ratio of punitive damages to actual harm, claiming (Opp. 21) that the actual harm should include the attorneys' fees and costs that they were awarded. However, there is no evidence that respondents (rather than their contingent-fee counsel) actually incurred these costs. Indeed, the expert used to establish the amount of fees and costs conceded that he did not know whether the costs had been paid by the attorneys rather than the clients. Tr. 355. In such circumstances, it is inappropriate to treat fees and costs as actual harm incurred by respondents. Even if those fees and costs were so treated, however, the ratio of punitive damages to actual harm would remain enormous — in the order of 55:1.

[7] Of course this case, unlike *TXO*, involves no failed attempt or unrealized potential harm that would support disregarding the small amount of actual harm.

line." 499 U.S. at 23. See also *Pulla* v. *Amoco Oil Co.*, 72 F.3d 648, 659, 660-661 (8th Cir. 1995) (White, J.) (noting relevance of the relationship of punitive to actual damages and striking down punitive exaction that bore no reasonable relationship to the plaintiff's actual damages). The fact that the punitive damages here are utterly disproportionate to the harm suffered by respondents is alone reason enough to hold this case for *BMW*.

2. *CE's conduct was not highly reprehensible.* Respondents' arguments that CE's tort was so egregious as to warrant $15 million in punishment (Opp. 13-14) are transparently unpersuasive. To begin with, respondents are simply wrong in claiming (Opp. 13) that the courts below "*necessarily*" found that CE acted with the specific intent to injure. Respondents argued vigorously in both courts below that CE waived its sufficiency arguments by failing to raise them at the close of all the evidence. Because the court of appeals did not explain its reasons for affirming, there simply is no way to know whether it reached the question of the sufficiency of the evidence of a specific intent to injure.[8]

For all of respondents' rhetoric, the tort in this case boils down to the failure to do more to prevent the escape of small quantities of acidic water, which is not even a true intentional tort, but rather lies somewhere between negligence and strict liability.[9] Moreover, even if respondents' assertion that CE was engaged in footdragging were accurate — which it is not (see pages 4-5, *supra*) — that hardly is the kind of conduct that warrants a $15 million punishment. See *Pulla*, 72 F.3d at 660 n.19 (suggesting that the undertaking of less expensive alternatives to fix perceived problems

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[8] To this day, respondents have failed to point to a stitch of evidence that CE intended to harm them. Accordingly, if anything, it is more likely that the court of appeals found a Rule 50(b) waiver than that it reached the merits of the argument.

[9] There is not the slightest foundation for respondents' characterization of the conduct as a "pattern of fraud, trickery, and deceit" (Opp. 14). Specifically, there was no evidence either that CE had committed environmental torts in other locations or that CE deceived respondents in any way.

before moving to more expensive ones should not even be grounds for imposing punitive damages).

3. The so-called "gain" to CE is not a proper basis for evaluating the amount of the punitive judgment. Respondents put forward as the principal justification for the $15 million punishment their expert's testimony that it would have cost CE $6 million to prevent their $47,000 injury. Opp. 16-19. As we explained in the petition (at 18), this theory has truly bizarre implications: it would, for example, justify a $250 million punishment for failing to spend $100 million to prevent a $500 injury. Whether respondents' counterintuitive defense of this type of result has any merit may be a question worthy of judicial consideration, but their argument is surely not so manifestly correct as to render the petition frivolous.[10]

Moreover, even if avoided costs were an appropriate ground for measuring punitive damages, there would have to be evidence that the defendant knew the amount of money it was saving by not taking additional precautions. Here, there was no such evidence. Indeed, there was no evidence that CE rejected *any* proposal on the ground that it wasn't worth the expense. Because CE never deliberately attempted to avoid a $6 million expenditure, it is neither fair nor rational to base its punishment on an after-the-fact assertion by the respondents' expert that it would have cost that much to remedy the problem.

4. The punitive damages in this case are disproportionate to other relevant benchmarks. Respondents urge this Court to

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[10] Much of respondents' defense of their theory is predicated on the assumption that CE's tort is equivalent to theft — that is, a deliberate, premeditated conversion of another's property. In fact, however, the tort here involves the failure to do more to prevent a lawful activity from harming another. Significantly, Georgia cases appear to bar punitive damages for a nuisance or trespass caused by a lawful regulated activity such as mining or mine reclamation, limiting neighboring landowners to compensatory damages for any harm suffered. *E.g.*, *Stone Man, Inc.* v. *Green*, 435 S.E.2d 205, 206 (Ga. 1993); *General Refractories Co.* v. *Rogers*, 239 S.E.2d 795, 799-800 (Ga. 1977). The court of appeals offered no explanation as to why these cases did not require reversal of the punitive damages *in their entirety*.

disregard the fact that the penalty here is 150 times that in the *Spires* litigation, claiming that the evidence here was stronger. Opp. 21 n.22. Whether or not the evidence was stronger in one case than the other is largely irrelevant, however, because we are not suggesting that *Spires* should serve as an outside limit, but rather as a "reality check." The similarities between the two cases render *Spires* more than adequate for that purpose. Both involve the same basic claim — that CE failed to do enough to prevent acidic water runoff after it took the property back from Pasco. The fact that one jury would assess the penalty for foot dragging at $100,000 (which was roughly three times compensatory damages), while another would assess it at $45 million (roughly 1,000 times compensatory damages) provides substantial ground for questioning the reasonableness of the latter verdict.

Respondents urge as their own benchmarks the maximum civil penalties available in Georgia and civil penalties actually levied under federal law. See Opp. 15-16 n.12. We readily agree that civil penalties provide a useful comparison, but only when the penalties are for *comparable* misconduct and/or harms. The federal penalties cited by respondents (involving such major environmental disasters as the *Exxon Valdez* spill and the Love Canal contamination) are so far removed from the harms here at issue as to support CE's position, not respondents'. As for the cite to Georgia fines, it is based on the counterfactual assumptions that CE was in violation every day during the four years before suit was filed and the preposterous notion that the EPD could conceivably regard CE's violation to be sufficiently egregious to warrant the maximum penalty. In fact, however, it is a matter of public record that the *only* fine levied by EPD against CE since the time CE took back the site from Pasco was the $10,000 fine that was part of the consent order. The punitive damages are **1,500** times that fine. Accordingly, respondents' comparative fines analysis serves only to demonstrate the excessiveness of the jury's exaction.

5. CE's wealth is not a sufficient basis for the $15 million exaction. Respondents contend (Opp. 20) that the $15 million punishment in this case is not an excessive percentage of CE's net worth. As Justice White recently pointed out for a unanimous panel of the Eighth Circuit, however, "a defendant's wealth cannot alone justify a large punitive damages award." *Pulla*, 72 F.3d at

659 n.16. When the punitive damages are disproportionate to the actual damages and the conduct is not on the high end of the reprehensibility spectrum, the defendant's substantial wealth cannot save the punitive damages from an excessiveness finding. *Id.* at 660-661 (striking down $500,000 punishment against Amoco notwithstanding Amoco's substantial net worth).

B. The Passion And Prejudice Issue

Respondents do not take issue with our contention (Pet. 20) that the courts of appeals have used inconsistent approaches in attempting to determine whether an excessive jury award was the product of passion and prejudice. Instead, they simply ask this Court to accept uncritically the trial court's conclusion that the verdict in this case was not the product of passion and prejudice. But it is well established that this Court will not blindly defer to a lower court's finding of fact (even when, as is not the case here, it is a state court's finding) "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske* v. *Kansas*, 274 U.S. 380, 385-386 (1927). Here, CE has a federal right not to have its remedy limited to a remittitur if the verdict against it was the product of passion and prejudice. Accordingly, just as this Court will review the finding that a verdict is not so excessive as to violate due process, so too is it appropriate to evaluate whether the $45 million exaction in this case was the product of passion and prejudice. Because this case involves both an enormous punishment that is wholly disproportionate to the plaintiffs' actual damages and a summation that invited the jury to punish CE because of its size and foreign parent,[11] this is an appropriate case for the Court to provide additional guidance on the passion and prejudice analysis.

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[11] Although respondents argue (Opp. 28 nn. 34, 35) that the evidence of foreign ownership and CE's value was properly admitted, what matters here is the inflammatory use to which they put that evidence. See Pet. 11-12.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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